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### Insubstantial Burdens

Chad Flanders

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## *Insubstantial Burdens*

Chad Flanders\*

### Introduction

Consider the following four stories, based on actual cases:

- *The Prisoner's Dilemma*. A prisoner, according to his religious beliefs, requires all his meals to be specially prepared. As a result of a prison lockdown, he is deprived of those specially prepared meals for three days. He sues, claiming that the denial of those meals has "substantially burdened" his practice of religion. Has his religion been burdened, or is the denial of those meals *de minimis*?
- *Lifting the Veil*. A woman who wears a veil according to the dictates of her religion refuses to get a driver's license photo taken with the veil removed. She is denied an accommodation, and as result cannot get a license. She sues, saying that the photo requirement substantially burdened her free exercise of religion. Is she right?
- *Spiritual bankruptcy*. A bankruptcy petition preparer draws up a filing for a client. A required form as part of that filing requires the preparer to list his Social Security Number. The preparer believes that a person's Social Security number is the "mark of the beast," and so he lists his as 000-00-0000. The filing is rejected. Has the preparer been substantially burdened by the requirement that he use his social security number on a client's filing?
- *Extra paperwork*. The government mandates that all non-profit corporations provide contraceptive coverage to their employees unless they fill out a form stating that they object on religious grounds to the requirement--in which case the government will pay for the coverage. A religious university balks and says that even filling out the form permitting the government to pay for the coverage is sinful. Are they substantially burdened by the requirement that they fill out a simple form asking for an exemption?

In order to win a claim under the Religious Freedom Restoration Act (or "RFRA"), you have to show that your religious beliefs have been "substantially burdened" by a governmental law or practice. Only then, according to RFRA, can you go on to press the government to show that they had a "compelling interest" in the law or practice. The *Hobby Lobby* debate brought to light how confusing and contested defining what a "substantial burden" is--and the debate promises to get even more muddled in the wake of *Hobby Lobby* and subsequent challenges to the so-called contraceptive mandate. Indeed, what the debate between the *Hobby Lobby* majority and dissent showed is not only that we don't have an adequate definition of substantial burden -- we don't even agree on how to approach the question.

In her dissent to *Hobby Lobby*, Justice Ginsburg accused the majority of taking an approach to defining substantial burden that abdicated the judicial role in determining what a substantial burden was. What the majority did—or what Ginsburg saw them doing—was giving the plaintiffs too much leeway in saying what a substantial burden on their religion was, to the extent that Alito (in Ginsburg's mind) was coming close to an outright refusal to second guess any plaintiff's statement that their

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religion had been substantially burdened. The *Hobby Lobby* decision,” says Ginsburg “elides entirely the distinction between the sincerity of a challenger’s religious belief and the substantiality of the burden placed on the challenger.”<sup>1</sup> In her dissent to the denial of cert in the *Wheaton* case, Sotomayor advanced the same line. “I do not doubt that Wheaton genuinely believes that signing the self-certification form is contrary to its religious beliefs,” she wrote. “But *thinking* one’s religious beliefs are substantially burdened—no matter how sincere or genuine that belief may be—does not make it so.”<sup>2</sup>

Whether or not the position Ginsburg and Sotomayor attacked was really the Court’s isn’t my main concern, because I think it is a position worth taking seriously. That position—which I will call the “fully subjectivist view”—holds that the definition of substantial burden (and so whether there is a substantial burden) *should be entirely up to the plaintiff*. In a phrase, you are substantially burdened if you say you are. Ginsburg and Sotomayor object to this position both because they don’t think it is what the law says, but also and more deeply because they think it is dangerous to give plaintiffs the freedom to go around calling things substantial burdens when they really, objectively aren’t. But there are familiar reasons to take the fully subjectivist view seriously. Courts are ill-equipped to decode what people’s religious beliefs really are, and this extends to decoding when those beliefs are substantially burdened. More strongly, there is a tradition that says decoding people’s religious beliefs and when those beliefs are burdened *is really none of the court’s business*. The fully subjectivist view is a natural extension of these principles.

I feel the pull of these principles, too, and I want to resist them only slightly. Accordingly, I defend in this essay what I will call the *partially* subjectivist view. On this view, the courts should largely defer to plaintiffs as to what is a burden on their religious belief. There is only a minor requirement that the plaintiffs show to make that burden substantial—and that is that the government is actually *doing something* to the plaintiffs. Not all bad things that the government does or that have effects on one’s practice of religion are really burdens on you. But if the plaintiffs do show this—that the government is actually *pressuring them*—then I think they have done all we really should require of them. In other words, and to make things more concrete, in the first three examples, I think there is probably a substantial burden. I am not so sure about the last case, because it may depend on facts about what the university really believes about its burden and whether those beliefs are factually correct.

My paper has four parts. The first two shorter parts are mostly expository. In the first part, I try to do some basic ground-clearing work on the concept of substantial burden. In particular, I focus on an important distinction highlighted by Lupu and Tuttle, between the *religious* and *secular* costs that may go into defining “substantial burden.” I think the distinction is important and analytically sound, but it may end up not matter much to the overall appeal of the subjectivist view; it does, however, help me state my thesis a more clearly. In the second part, I describe how the two foundational cases, *Sherbert* and *Yoder*, give us very little help in figuring out what a substantial burden is, and especially in how we give meaning to “substantial.” We are pretty much on our own.

In the third and fourth parts, I turn to make my argument for the partially subjectivist view. The third part proceeds mostly by means of the examples I started the paper with. Courts do a bad job of defining substantial burdens generally, and so they should stay away from doing so. A lot of cases that get kicked out at the substantial burden stage should really last until the compelling interest stage—and *then* lose. Other cases should be decided on grounds that the person’s religion wasn’t burdened at all, not that there was only a minor burden. Although the end results are the same, it matters how we get there.

In the fourth part, I lay out the partially subjectivist view. The key thing that makes it not fully subjectivist is this: courts shouldn’t defer to plaintiffs as to whether something is a burden or not. Here

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<sup>1</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2799 (2014) (Ginsburg, J., dissenting).

<sup>2</sup> *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2812 (2014) (Sotomayor, J., dissenting).

plaintiffs seeking relief have work to do. But if they show that the government is putting pressure on their religious beliefs, they have passed the burden test, and it is up to them—and their interpretation of their religion—whether that burden is substantial. In a way, the partially subjectivist position holds that the only insubstantial burdens under RFRA are (a) those that plaintiffs say themselves are not substantial or (b) are not really burdens at all. Courts should kick out only those cases where there really isn't a burden, which may include some cases where plaintiffs *think* there is a burden—to this extent, thinking there's a burden doesn't always make it so. What courts shouldn't do is kick out a case where there is a burden but it is supposedly "insubstantial."

I should note at the outset that in a sense, my argument is quite modest. I present it as a way of solving a riddle about substantial burdens in RFRA: how do we define "substantial burdens" without getting into the business of telling people what is or isn't important in their religious life? My answer is that we should generally defer to the subjective beliefs of plaintiffs as to what is a substantial burden. Importantly, my argument does not say that a scheme that adopts this view of RFRA is all told normatively desirable. It is perfectly possible to say, "Yes, this is the best reading of RFRA, but then there is all the more reason to reject RFRA as a good law." In other words, my argument can just as easily be seen as a *reductio ad absurdum* of RFRA as a defense of it.

#### I. The Two Burdens of "Substantial Burden"

In the *Hobby Lobby* case, the majority found both that there was a substantial interest and—what it assumed for the sake of argument—a compelling interest. Famously, *Hobby Lobby* won because there was a least restrictive means the government could have taken, but didn't. But what was the burden on *Hobby Lobby*, and what made it substantial? Alito in the majority opinion uses substantial or some variation of it in two contexts. First and most regularly, he uses substantial in relation to the fine that the government would impose on *Hobby Lobby* if they failed to comply with the mandate. They would have to pay a lot of money, Alito says; indeed, it would be an amount so great as to put "substantial" pressure on them to comply with the contraceptive mandate. Second, Alito *also* talks of the burden *Hobby Lobby* would face in terms of their own religion: that they would have to commit a "scandal" by supporting people in their use of contraception and contraceptive devices they (*Hobby Lobby*) felt to be sinful. It is here that he says it would be wrong to question the sincerity of the *Hobby Lobby* plaintiffs and that it was not the Court's place to say that they were either "mistaken" or (importantly for our purposes) "insubstantial."

Lupu and Tuttle have recently and rightly pointed out that the substantial burden analysis should usually end up encompassing *two* types of burdens, and the *Hobby Lobby* case shows how this is so.<sup>3</sup> The costs of noncompliance have to be substantial, and the costs of complying have to be substantial as well. Moreover, some costs will be religious costs and some will be secular. In fact, the better understanding of "burden" under RFRA is to say that a plaintiff is "burdened" if she is put to a choice where she either has to pay substantial secular costs if she chooses not to comply with the law at issue, or she has to pay substantial religious costs if she does obey. A person *either* has to violate her religious beliefs in some substantial way by obeying the law, or has to pay a steep secular cost if she breaks the law. So in the context of *Hobby Lobby*, that choice looks something like this:

*Secular costs:* If *Hobby Lobby* does not obey the contraceptive mandate, then the government will fine them a "substantial" amount of money.

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<sup>3</sup>Ira Lupu and Chip Tuttle, *Religious Questions and Saving Constructions*, Scotusblog.com (Feb. 18, 2014) at <http://www.scotusblog.com/2014/02/symposium-religious-questions-and-saving-constructions/>

*Religious costs:* But if Hobby Lobby does obey the contraceptive mandate, then Hobby Lobby will face a “substantial” burden on the practice of their religion.

In the *Hobby Lobby* case, Hobby Lobby loses in terms of religious costs if it complies with the mandate (or so it says) and it loses in terms of secular costs (money, mostly) if it doesn’t comply with the mandate (or so we can see). Either way, the burden is substantial for them. More generally, the plaintiffs in RFRA cases need to be in a Hobson’s choice, whether either way they choose, they lose: substantial secular costs on the one hand, substantial religious costs on the other.

I think Lupu and Tuttle’s analysis here is sound, and it helps me be able to state my thesis with more analytical clarity: I think to the extent that courts *do* consider it their business to determine whether there is a substantial *religious* burden, they should pretty much stop. The only burden that they should even potentially be concerned with being “substantial” is the secular burden: how great was the *secular* pressure applied to the plaintiffs, and did it rise to the level of being substantial. How much were the secular costs faced for not doing what the government wants? Whether this pressure put on the plaintiffs also leads them to face a substantial religious burden—that is a question on which courts should largely defer to plaintiffs. There is a substantial religious burden, for the most part, if plaintiffs say there is—that is, if they say that following the law would lead to them compromising their sincerely held religious beliefs. The court is relegated to determining that the plaintiffs’ beliefs were religious, and sincerely held, and only in a very minor way, that that they were burdened.

My major argument in this essay is that courts should not be saying whether a religious burden is insubstantial. But even with determining secular—as opposed to religious—costs there are problems, and so I want to make three brief notes, which I’ll follow up on in later in the paper, in Part III.

First, even if courts should determine whether there is a substantial secular cost, there is an initial problem in figuring how exactly they should go about doing so. It is a very hard thing, for instance, to say how much money is a “substantial amount” for a corporation. Maybe the tax penalty in the Hobby Lobby case really was a substantial penalty; maybe it was not. What about a \$100 a day fine for a millionaire? There seem to be problems about deciding these sorts of things with any kind of precision, or for that matter, confidence. And there is a further, deeper problem with defining *what kinds* of secular costs are relevant in the first place. *Braunfeld v. Brown* said that a competitive disadvantage should not be considered a secular cost at all; *Hobby Lobby* seemed to have a different take.<sup>4</sup> Criminal penalties seem to count, but do those penalties have to be severe? Is a fifty dollar fine enough to be a substantial cost? Is the stigma of a *one* dollar criminal fine bad enough?

Maybe this is not too much of a concern, as in many cases, the secular cost will be sufficiently severe—a very large amount of money if I don’t comply with the mandate, a jail term if I don’t send my kids to school, starving if I refuse to eat non-Kosher meals—so that there won’t be a real question as to the pressure to conform with a governmental mandate that goes against one’s religion. Everyone will agree. Other cases—not getting a driver’s license, or not being able to play basketball—may be harder.

Second, courts do not very often separate the secular and the religious burden. Rather, they treat them as part of a single analysis: the burden is viewed as a function both of the secular cost and the religious cost, both of which have to be substantial (or to repeat the formula above, a “substantial burden” is just when the plaintiff is faced with the choice between a substantial religious cost and a substantial secular cost). And when the courts do separate secular and religious costs, they will naturally fix on the religious cost first, because if there is no religious cost, then the secular costs just won’t matter. The first two examples in my paper (*prisoner’s dilemma* and *lifting the veil*) are just like this.

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<sup>4</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2770 (2014).

But this leads me to my third point. It may be that even when we can cleanly separate the religious and secular burdens, we should also defer to the plaintiff about when a secular burden is “substantial.” This would be to extend subjectivism not only to religious burdens, but also to secular burdens; the plaintiff decides when the secular costs—giving up a benefit, or facing a penalty—are just *too much*, so much so that they put her in a position where she may feel she has no choice but to violate her religion. It stands to reason that this “secular breaking point” will be different for different people and so long as there is a religious burden then we should it to plaintiffs to sort themselves out as to whether the secular burden is too much for them to bear. Those who can bear the burden, or who don’t even notice, won’t sue. Those who feel the burden will sue. I find this extension of the subjectivist position attractive, but I will leave any further analysis and defense of it to the third part of this paper and my third example (*Spiritual Bankruptcy*).

## II. The Limited Usefulness of *Sherbert* and *Yoder* in Defining “Substantial Burden”

We could look at substantial burden philosophically, and I do want to do this (in fact, I already have, by noting a conceptual distinction we can make between secular and religious substantial burdens). But RFRA itself tells us that we should not be guided by some abstract notion of substantial burden, but that we should turn to cases. In particular, RFRA says that its purpose is to “restore” the test used in *Sherbert v. Verner* and *Yoder v. Wisconsin* to protect religion when it is “substantially burden.”<sup>5</sup> Because the legislative history of RFRA is so murky, the guidance of the cases is perhaps the best tack we have in trying to figure out what the contours of a “substantial burden” are.

But the cases don’t give us guidance about substantial burdens—in fact, they don’t even use the phrase.<sup>6</sup> Even worse, they aren’t that conceptually illuminating on what counts as a more or less substantial burden. Either they say too little, as in *Sherbert*, or they say too much, as in *Yoder*. *Sherbert* doesn’t give us much idea of what a *substantial* burden is (although it does give us some sense of what a burden is). *Yoder* may in the end just give us one example of a really substantial religious burden—and so not be that helpful in defining the threshold of when a religious burden just barely becomes “substantial.” What *Shebert* and *Yoder* tell us, maybe indirectly, is that defining substantial burden is just hard. This in turn may further persuade us of the benefits of avoiding a judicial determination of substantial burden, and adopting a subjectivist position on the matter. In other words, the failure of caselaw to yield any good answers in the end pushes us to something like a philosophical point about deferring to plaintiffs.

Begin, then, with *Sherbert*. The key issue in that case was not really about whether the burden was substantial or insubstantial, but rather whether even *indirect* burdens could count as burdens for the sake of the First Amendment analysis. Here the Court held that they could: even if the consequences of a law might only be an “indirect result” of welfare legislation, that would only be the “the beginning, not the end of our inquiry,” for a law that indirectly burdened religious observance would still *burden* religious observance. Thus, the answer to what the Court called its “first question”—whether a

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<sup>5</sup> 42 U.S.C.A. § 2000bb (West).

<sup>6</sup> “Neither *Sherbert* nor *Yoder* used the majority’s substantial burden test as the trigger for the application of the compelling interest test. The Court in *Sherbert* and *Yoder* used the word “burden,” but nowhere defined, or even used, the phrase “substantial burden.” After holding that the exercise of religion was burdened in each case, the Court simply did not opine on what other impositions on free exercise would, or would not, constitute a burden.” *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1088-89 (9th Cir. 2008) (Fletcher, J., dissenting).

disqualification for benefits imposed “*any burden*” on the free exercise of religion—was yes, whether or not that burden is direct or indirect.<sup>7</sup>

Note that the Court chose to use the phrase “any burden” rather than “any substantial burden.” And as if to show it did not care about the degree of burden imposed, here are some things the Court did not do. The Court did not ask whether attending worship on Saturdays was a central or even required part of her Seventh Day Adventism. So the Court did not seem especially concerned to measure the extent of the religious cost to Sherbert. The Court also did not investigate the value of the unemployment benefits Sherbert would *not* get if she decided not to work rather than to violate her religious beliefs. It did not for that matter look into how wealthy Sherbert was—that is, into whether she really needed the unemployment compensation to survive or to lead a tolerable existence, although presumably she had to fall below a certain level in order to be eligible for benefits. So neither did the Court inquire into the actual, financial burden on Sherbert—and test whether that secular burden was substantial.

However, when discussing how to balance the compelling state interest with the burden on Sherbert, the Court *does* suddenly switch to speaking in terms of whether the “infringement” of—not the burden on—Sherbert’s First Amendment rights is “substantial.”<sup>8</sup> But the very phrasing should make us wary of what the Court means, if indeed means anything. Usually we speak in terms of whether a right is violated or not, and not in terms of whether that violation was *substantial*. Compare this to how we deal with governmental interests: here there is a sliding scale, from hypothetical to substantial to compelling. Not so with rights. Rights are either violated or they are not. We might think that an insubstantial burden led to no rights violation. But it might be odd to say that an insubstantial burden led to an insubstantial infringement.<sup>9</sup>

*Yoder*, by contrast, does speak in terms of “unduly” burdening the free exercise of religion, a phrase it uses in summarizing the holding in *Sherbert*.<sup>10</sup> And the rest of *Yoder* does seem to care and care very much that the burden on the Amish religious belief was more than minor. The Amish were threatened with criminal penalties if they didn’t comply, a serious secular cost (although the fine involved was only \$5 per defendant). The requirement of compulsory secular education appeared to hit at the fundamentals tenet of their religion, at least according to Justice Burger. Burger even suggests that compliance with the educational mandate would possibly mean the destruction of the Amish religion, what Burger calls the “objective danger” that the free exercise clause was designed to avoid. So we have the language of not just serious costs to the Amish *qua* persons (criminal penalties) but to the

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<sup>7</sup> *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). See also *Cambodian Buddhist Soc. of Connecticut, Inc. v. Planning & Zoning Comm’n of Town of Newtown*, 941 A.2d 868, 895 (Ct. 2008). (“We note that the United States Supreme Court in *Sherbert v. Verner* which RFRA and § 52–571b intended to codify, did not use the ‘substantial burden’ language but indicated that any ‘incidental burden’ on the free exercise of religion must be justified by a compelling state interest. The court in *Smith* later characterized *Sherbert* as holding that ‘governmental actions that *substantially* burden a religious practice must be justified by a compelling governmental interest.’”)

<sup>8</sup> *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

<sup>9</sup> In other words, not every burden on or hindrance to the exercise of a right leads to that right being infringed: you have to read a certain threshold. The Court sometimes speaks this way, in more than one context: “As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right. An example clarifies the point. We have held that not every ballot access limitation amounts to an infringement of the right to vote. Rather, the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote.” *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 873–74 (1992).

<sup>10</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). In other places, however, the opinion refers to the test as only involving a claim of “interference” with the practice of religious belief—with no qualifier.

Amish *qua* Amish—that is *qua* religious believers. They are caught between a heavy secular cost and a heavy religious cost.

Does this, then, help answer our question as to what a “substantial burden” is? Sort of. The burden in *Yoder* seems extreme, and Burger takes pains to emphasize how “burdensome” the burden at issue is. But by going so far in the direction of specifying the extreme nature of the burden, *Yoder* for all its detail about the nature of the burden faced may end up being as unhelpful as *Sherbert* was in its lack of detail. The fact that we know that something is certainly a burden, that whatever a burden ends up being *this* certainly is one, is not the best way to get at the definition of a burden. To say that something is “expensive” if it costs a billion dollars, it turns out, tells us very little about the nature of “expensiveness.” How do we decide when it comes to deciding whether something that costs only 50 dollars is expensive?

More specifically, here are two things we don’t know after *Yoder*: (1) whether something is only a substantial burden if it involves the violation of “fundamental tenet” of a religion,<sup>11</sup> (2) whether something is only a substantial burden if the very existence of a religion is threatened. What happens when something *less* than these things are involved? Do we still have a burden? For all we know of *Yoder*, a substantial burden might only be a burden if the law at issue has to violate a central tenet of the religion, and has to risk the destruction of the religion. Knowing an extreme application of a concept doesn’t get at what the ordinary or usual application might be. And so we may be not very much further than we were at after *Sherbert*. *Sherbert* said that there had to be a burden, but didn’t say how great the burden had to be—or even if it had to be great at all. *Yoder* says that a very great burden is a burden. So: what is a *substantial burden*?

### III. Finding An Insubstantial or No Burden: Some Problems and a Very Short Argument for Judicial Avoidance

Of course, the fact that *Sherbert* and *Yoder* don’t by themselves tell us what a substantial burden is and at best give unsure guidance does not mean that defining “substantial burden” is an impossible task. Many circuits courts have done it, and have offered various and conflicting answers. Maybe one of those is the right answer, and the one that provides a standard for determining when there is a burden and when that burden is substantial. But here I want to approach the question of substantial burdens from a different angle, with the question of when a burden is so minor, it counts as an *insubstantial* burden.

Where circuit courts seem most ready to employ a doctrine of insubstantial burdens—as opposed to a doctrine of when something is a substantial burden—is in cases involving the religious freedom of prisoners. The logic of developing such a doctrine is obvious. As then-Judge Sotomayor put it, “The substantial burden test, however, presupposes that there will be cases in which it comfortably could be said that a belief or practice is so peripheral to the plaintiff’s religion that any burden can be aptly characterized as constitutionally de minimis.”<sup>12</sup> If there are substantial burdens, there are also going to be burdens that are not substantial (if not actually, then at least possibly). If courts have been able to consistently and precisely say when a burden is insubstantial, this may be able to give us insight—by comparison—as to when a burden is “substantial.” Kick out the insubstantial burdens, and what you have left are the substantial ones.

I am going to argue in this part that courts that have developed this kind of doctrine have made a mess of it—not because they have misapplied the doctrine of insubstantial burdens, but because such a doctrine seems to be inherently messy. It involves drawing fine lines, and lines that moreover courts

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<sup>11</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

<sup>12</sup> *Ford v. McGinnis*, 352 F.3d 582, 593 (2d Cir. 2003)



are not good at drawing and really have no business drawing. Better that courts stay out of it, and if substantial burden needs to be defined, leave it to the plaintiff. What is even more frustrating about these cases, too, is that many of them should have come out the same way, viz., with the plaintiff losing. But the plaintiff should have lost not because there wasn't a burden, but because the state interest is normally "compelling."

I proceed in this part by going through the first three examples that I led off my paper. Because courts apply the insubstantial (religious) burdens doctrine so often in prisoners' rights cases, I start with an example of one of those—the prisoner's dilemma. I then consider two other situations—lifting the veil, and spiritual bankruptcy—where courts found no substantial burden and argue against the court's holdings in those cases, too. In each case, I try to say (a) why I find what the court does so unpersuasive, and (b) suggest a better way of analyzing the case. The upshot of this part, if I am successful, should be that courts should not define many (if any) religious burdens as insubstantial and *they don't need to* in order to get the right results in those cases. In considering the third example, I stretch the point tentatively: maybe the courts shouldn't even be deciding when there is substantial *secular* pressure on people to modify or change their religious beliefs.

#### A. Prisoner's Dilemma

A good example of the application of the "insubstantial burdens" doctrine comes in a brief, unpublished opinion from the Third Circuit, which is so short and so slight (and so dismissive) that it rehearses the basic facts in a footnote. A prison in Lewisburg, PA, was put on lockdown, where all prisoners were confined to their cells.<sup>13</sup> The lockdown began around lunch at May 15, 2005, and ended about three days later—breakfast, May 18. Because of the lockdown, Michael Norwood "did not receive a religious certified (halal) meal," as he usually received. By the court's own count that meant Norwood didn't get his halal meal seven times. The court's question: Did the deprivation of his certified meals mean that Norwood's religion was "substantially burdened"?

The court begins by rehearsing the general rule that deprivation of meals *can* be the basis of a successful claim. Cases "generally indicate," the court writes, "that prison administrators must provide an adequate diet without an inmate's religious dietary restrictions in order not to unconstitutionally free burden free exercise rights."<sup>14</sup> We can expand a little on what the cases generally indicate. Many religions put a premium on eating correctly and not defiling the body with certain foods. So prisoners who have—sincere—religious beliefs and those beliefs require a certain diet, can obviously be burdened if they don't get those meals. If they are not served those meals, then they also face a real hardship. In some cases, they may not be able to eat the full meal they *are* served, so they may end up with a nutritionally inadequate diet. If they can't eat *any* of the meal because it is not certified, then they risk starving. As the Third Circuit closes its summary of the cases, "in essence" there is a "right not to be forced into a Hobson's choice of either eating food items which offend one's religious beliefs, or eating very little or not at all."<sup>15</sup>

But then the court distinguishes the *Norwood* case from its past cases, saying "the issue here ... is much more circumscribed," that is, it is only (the court says) about whether a "short denial" is a substantial burden or a mere "de minimis intrusion."<sup>16</sup> This is the distinction that (what I've been

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<sup>13</sup> The emergency lockdown was initiated in *Norwood* "following an altercation between inmates[ ] representing certain volatile geographical and racial groupings." Def.'s Statement of Facts, *Norwood v. Strada*, No. 1:05-cv-2410 (M.D.Pa. Feb. 21, 2006), ECF No. 18, Ex. 2, ¶ 3.

<sup>14</sup> *Norwood v. Strada*, 249 F. App'x 269, 271 (3d Cir. 2007).

<sup>15</sup> *Id.* at 272.

<sup>16</sup> *Id.*

calling) the insubstantial burdens doctrine invites: that there may be some actual burdens on religious practice that are nonetheless so minor, so trivial, that we can freely invoke the maxim that the law does not care about small things. And the court finds that doctrine holds here. The amount of time, and the number of meals missed, was just not substantial enough of a burden for the law to take note.

One might have been able to see the problem if the opinion had ended here, but the court goes on to cite a case—for comparison—from the Second Circuit where the court found that denial of *one* meal, if that meal is unique enough and important enough. So the question for the Norwood court has to be: why is it that denial of one meal could be sufficient for a substantial burden, if that meal is special enough, but that seven meals is de minimis? There are factual problems here (do we know that none of the meals Norwood missed was “special”?), but also problems of deep incommensurability. Do we know how many missed regular religious meals is the equivalent of the denial of one special religious meal? And couldn’t every religious meal be “special” for the believer? (In fact, I believe that this is almost certainly the case.)

The line drawing problems are, it seems to me, insurmountable, and appear in other cases that try to draw a line between substantial and insubstantial violations. In a case that distinguishes *Norwood*, the court finds that denial of thirty-six meals over a twelve day span (with a few more complicating factors which I put to the side here) amounted to substantial burden.<sup>17</sup> That case in turn cites a New York case that found a substantial burden where the plaintiff was denied “at least one” religious meal a day for fifteen days. Where does the balance tip in days and meals from substantial to insubstantial? It is hard, probably impossible, to say.

But there is a second problem in the court’s analysis in *Norwood* as well. The way the court cashes out its decision is by saying that “it is incredible that in such a short time period Norwood would have been forced to abandon one of the precepts of his religion, or that he would have felt substantial pressure to modify his beliefs.”<sup>18</sup> The way the court speaks, it is as if the violation of Norwood’s religion is something prospective—something that may or (more likely) may not happen in the future, as the result of his not getting seven certified meals. The pressure he faced wasn’t enough, the court seems to say, for him to give up his religious beliefs. But that’s just wrong, or at least it is hard to parse. Presumably, for Norwood, *the violation of his religion has already happened*: he has already eaten non-certified meals. By skipping the religious meals, Norwood was “abandon[ing]” one of the “precepts of his religion.” He is suing because he *has* violated his religious beliefs, and because he was forced to, by the lockdown—and to Norwood, this violation was not a small thing.

This conclusion (that Norwood’s beliefs were substantially burdened) doesn’t mean that Norwood should have won. In fact, he probably should have lost. And the reason the prisoner should lose is that in nearly every case is because the government interest is usually compelling enough to outweigh any burden on the prisoner. Take as a good counterexample, the case of *Singson v. Norris* out of the Eighth Circuit.<sup>19</sup> In that case, Singson said that the prison policy of requiring her to check out tarot cards from a chaplain violated her right under RLUIPA because it prevented “spontaneous” card readings. The court noted that no one had challenged Singson’s religious sincerity; presumed there was a burden; and then in two paragraphs explained the security concerns of the prison and found for the state. The analysis is in the end about as short, and much more persuasive, than that in the *Norwood* opinion. The *Norwood* court involves itself unnecessarily in a muddle.

## B. *Lifting the Veil*

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<sup>17</sup> Potts v. Holt, No. 3:CV-12-1441, 2014 WL 1371911 (M.D. Pa. Apr. 8, 2014).

<sup>18</sup> Norwood v. Strada, 249 F. App’x 269, 272 (3d Cir. 2007)

<sup>19</sup> Singson v. Norris, 553 F.3d 660 (8th Cir. 2009).

Another example of the misuse of the insubstantial burdens comes in the case of *Freeman v. Department of Highway Safety*. In that case, Sulataan Lakiana Myke Freeman argued that it was against her religion to be photographed without a veil—something the Florida Department of Highway Safety required if she was to have a driver’s license.<sup>20</sup> Freeman testified that, for her, Islam meant that it was “not an option” for her to have a photograph taken of her without a veil, and that the Department impermissibly put her to a choice between violating her religious beliefs or not being able to drive. At trial, both sides had religious experts. The state’s expert testified to the Islamic religious doctrine of “necessity” that allowed photography of the face in certain circumstances. Freeman’s expert denied that the doctrine of necessity applied to removing the veil in order to take a driver’s license photograph, although it could possibly apply in other contexts.

Was there a substantial burden here? The issue was considered at both the circuit level, and then on appeal at the trial level. Interestingly, the two courts ended up reaching the same result, and with fairly similar (bad) reasoning. They found against Freeman, which is possibly the right result. But consider two ways the courts could have gone, or at least emphasized more. The courts could have said that not being able to drive is not a serious cost, and so the loss of that benefit (as opposed to, say, the loss of a welfare benefit, as with *Sherbert*), did not put substantial *secular* pressure on Freeman to be photographed without a veil. She could just walk away.<sup>21</sup> Or one might imagine the courts saying that there was a burden, but that the state’s interest in a system of photo identification for drivers outweighed it.<sup>22</sup> In fact, the trial court did say the latter, but only as an alternate holding—and only after making it clear that it didn’t really need to reach the issue of the state’s interest at all.<sup>23</sup> The circuit court and district court put most of their eggs in a different basket.

The trial court opinion, to begin with, is confused, even if it is not as confused as the circuit court opinion.<sup>24</sup> The district court first held that Freeman could not sincerely hold that photographs of her face were impermissible, because she believed that photographs of women wearing veils were OK and because her husband, who ostensibly shared her religion, *was* willing to be photographed for his driver’s license. Put aside the question of whether another family member’s interpretation of religious belief should matter at all to the rest of the family. And put aside the general uncharitableness of the trial court’s parsing of Freeman’s religious beliefs. There is at least *something* to the court’s inquiry: the

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<sup>20</sup> *Freeman v. Dep’t of Highway Safety & Motor Vehicles*, 924 So. 2d 48 (Fla. Dist. Ct. App. 2006)

<sup>21</sup> “In its appeal, the Bureau of Motor Vehicles first argues that the trial court erred in finding coercive state action. The gist of this argument is that there is no ‘right’ to drive in this state, rather, driving is merely a privilege. In other words, the state’s position is that no First Amendment problem is raised where a citizen’s free exercise right is brought into conflict with a mere privilege.” *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.*, 380 N.E.2d 1225, 1229 (Ind. 1978).

<sup>22</sup> “Finally, the Bureau contends that the trial court erred in rejecting its attempt to show a compelling state interest in the photograph requirement. At trial, the Bureau advanced two purposes for the photo requirement which it felt were of sufficient importance to constitute an interest which should outweigh the infringement upon the appellees’ rights. These purposes were summarized in appellant’s brief as follows: ‘(T)he state has a duty to continually insure the competency of Indiana drivers by testing knowledge of the laws of the road, testing the ability to drive, and constantly checking each driver’s knowledge, ability and obedience. It is only through proper identification that such continual checking can be made by the various law enforcement, judicial, and administrative officers who aid the Bureau of Motor Vehicles in its responsibility.’” *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.*, 380 N.E.2d 1225, 1229 (Ind. 1978).

<sup>23</sup> See *Freeman v. State*, 2003 WL 21338619, at \*4 (Fla. Cir. Ct. June 6, 2003) (holding, in the alternative, that photo identification was “necessary to support the compelling state interests of promoting public safety and security, combatting crime and of protecting interstate commerce”).

<sup>24</sup> *Freeman v. State*, 2003 WL 21338619 (Fla. Cir. Ct. June 6, 2003).

court did seem genuinely befuddled by the nature of Freeman's belief system, and how she could hold it sincerely.

But the court said more. The district court held that the act of taking the photograph did not burden Freeman either, because the process of getting photographed was brief, and the photo could be taken in a private room, and she need not actually show the photograph to anyone except law enforcement officers. The court found that this burden wasn't *substantial*. But in finding this, the court simply contradicted what Freeman said her beliefs were, and what she said the burden on her actually was, viz., that she remove her veil for the sake of taking a driver's license photo. Of course, if one thought (as the trial court apparently did) that Freeman wasn't sincere about that her beliefs, then it follows that violating her insincerely held beliefs would not be a burden, let alone a substantial one. It is not obvious why the trial court even went on to the next step of assessing whether the burden was substantial, when it should have just stopped with the finding that she was insincere.

The circuit court was more explicit that it was adopting something like the insubstantial burdens doctrine. Some things were mere inconveniences, and this was one of them: Freeman's "veiling practice is 'merely inconvenienc[ced]' by the photograph requirement" and not substantially burden. But the way the court applies this doctrine is hard to follow. After finding that Freeman's beliefs were sincere, it goes on to side with the state's expert that veiling is really not required in the context of getting one's driver's license picture taken—all that really needs accommodating is beliefs that the photograph be taken in a certain context (e.g., by using a female photographer).<sup>25</sup> The court seems to be saying that there is no burden here at all, not that there was only a mere inconvenience. The court is applying a doctrine that doesn't really apply if what it says elsewhere in its opinion is true (again, something similar seems true about the lower court opinion as well).

What the court is doing, I think, is disguising its finding that the plaintiff wasn't sincere in the language of insubstantial burdens. Freeman says she abides by Islamic law, but Islamic law doesn't forbid unveiling for a driver's license photograph. This might be right, but it is not the same as saying that unveiling for a driver's license photograph is only an insubstantial burden. It is saying that *there really is no burden in the first place*, because the state is not putting Freeman in a position to violate her religious beliefs.

Why put the blame for the result in this case on the insubstantial burdens or "mere inconvenience" doctrine? Because what the circuit court did, I think, was to reason this way: there are photographs in other circumstances allowed by Islamic law, so one more photograph is a most de minimis burden on Freeman's religion. But how do we know this? Here we have the same puzzle as how we know that denying thirteen meals is a substantial burden, but denying seven is not. And in the Florida case, the problem is much more obvious. Freeman saw the photograph not just as an incremental burden on her, but as crossing a (to her) bright line from permissible to impermissible. This is why I think what the court really was doing was saying that they didn't believe Freeman; that she was being insincere that her religion required no driver's license photo; and accordingly, one more photograph wouldn't hurt.<sup>26</sup> If the court were more transparent in its reasoning, they would have found

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<sup>25</sup> Freeman v. Dep't of Highway Safety & Motor Vehicles, 924 So. 2d 48, 57 (Fla. Dist. Ct. App. 2006).

<sup>26</sup> "The reasoning of the court in Freeman is problematic for several additional reasons. First, as previously discussed, there are many interpretations of Islamic principles and one expert's opinion may not reflect the religious beliefs of other Muslims. Freeman's expert even testified that the Islamic exceptions did not apply to state license photographs. It is a vast leap of logic for an individual to infer that because Islam makes exceptions for medical necessity and identification for burial purposes in addition to a few other exceptions, that such exceptions extend to DMV photo requirements. Second, the court should not have considered Saudi Arabia's practices to support the idea that photo requirements in the United States should be required. The social and cultural aspects of Saudi Arabian society and American society are incomparable. It is also overly simplistic to assume that Saudi practices would necessarily adhere to Islamic principles, or Freeman's religious beliefs. Freeman

no burden, not an insubstantial one. I still don't think this is the right result—but it at least it would have been more honest.

### C. *Spiritual Bankruptcy*

The previous two examples were of courts finding an insubstantial burden, or mere inconvenience, on the plaintiff's practice of religion. In the prison case, the court found the burden to be *de minimis*. In the driver's license case, the court found the burden to be a mere inconvenience. Importantly, both were examples of a court finding an insubstantial religious burden and neither court (I think) did a very good job. In the prison case, the court drew an arbitrary line between what was a substantial burden and what was an insubstantial one. In the driver's license case, the court found the burden on Freeman to be a mere inconvenience, although their reasoning in fact suggests that the court really thought there was *no* burden. In both cases, the court second-guessed or just plain rejected the religious beliefs of the plaintiff—either because those beliefs were “substantially burdened” (Norwood) or ultimately not burdened at all (Freeman).

In a case which involved, in part, the complaint of a prisoner about being deprived of properly blessed food, Judge Guido Calabresi laid out why having courts determining what burdens are substantial or not is a bad idea. “Our founding principles require that courts resist the dangerous temptation to try to judge the significance of particular devotional obligations to an observant practitioner of faith.”<sup>27</sup> Calabresi quotes from the Supreme Court next: It is not within the “judicial ken” to question the “centrality of certain beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.”<sup>28</sup> Both of those faults are on display in the above two examples: to say that missing a religious meal is somehow *de minimis* is to question how central even a single meal might be someone like Norwood; and to say that Islamic law just does allow driver's license photos is to question the validity of Freeman's interpretation of her creed. Calabresi's insights in that opinion are well taken—as is his ultimate decision to reverse and remand the judgment that there was no substantial religious burden. Calabresi does mention the insubstantial burdens doctrine, but he is hesitant to embrace it and he flirts with the idea of giving up on substantial burden talk altogether. Rejecting the substantial burden test—or at least most of it—is what I want to urge, especially when it comes to assessing what is or is not a substantial religious burden.

But I think related problems come up in trying to define what a substantial secular burden is, and I want to consider a case where the issue is whether there is substantial secular pressure on the plaintiffs. I speculated that the *Freeman* court might have decided her case on secular grounds, by finding that the loss of a driver's license was not a serious burden in its own right: this may not have been right (other courts have held that loss of the right to drive is a serious loss), but at least it would not have involved the court in questioning the religious side of Freeman's burden. But can we construct a workable test for substantial secular burden? And even if we can, might such a test bring us too

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is an American convert to Islam, and has no connection to Saudi Arabia or its practices. Finally, the court was in no position to decide what Freeman's religion required. When dealing with Christian plaintiffs in *Quaring* and *Pentecostal House of Prayer*, the court did not look to mainstream Christianity to determine whether the religion prohibited photographs, it looked to the individual plaintiff's beliefs.” Aliah Abdo, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf*, 5 HASTINGS RACE & POVERTY L. J. 441, 492 (2008)

<sup>27</sup> *McEachin v. McGuinnis*, 357 F.3d 197, 201 (2d Cir. 2004)

<sup>28</sup> *McEachin v. McGuinnis*, 357 F.3d 197, 201 (2d Cir. 2004) (quoting *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989)).

close—if not exactly crossing over—into second-guessing the religious burden on the plaintiff as well?<sup>29</sup>

*In re: Turner* involved Jim Snyder who was a “bankruptcy petition preparer,” who had prepared a filing for a couple declaring bankruptcy.<sup>30</sup> The filing, as far as we know, was in good order but there was one problem: where the document said to put the preparer’s Social Security number, he instead put ten zeros (“00000000”). Snyder believed that the government imposed Social Security number was the “mark of the beast,” as described in various Christian scriptures. Snyder was given a number, but—he said—he had renounced it. He faced, in part, a fine for not putting his number on the filing.

Snyder brought suit, saying his right to religious freedom under the First Amendment had been violated; the court, *sua sponte*, also considered a RFRA claim under the facts. For the RFRA claim, the court found Snyder’s beliefs were sincere, but that the question of whether his religion had been substantially burdened was not even “close.” The privilege of “being a bankruptcy petition preparer” just wasn’t a substantial cost that Snyder’s faced—certainly not as substantial as losing one’s welfare benefits or one’s driver’s license (and here the court cited cases where those benefits were denied to people who refused to disclose their Social Security numbers).<sup>31</sup> Snyder’s “burden” was far more like a Sikh who could not enlist in the Army because he couldn’t comply with the military’s dress code—one had the right to dress as one’s wished, but one didn’t have the right to enlist. So too with Snyder: he had the right not to use his Social Security number, but he didn’t have the right to be a bankruptcy petition preparer.<sup>32</sup>

It is not obvious that being denied the ability to work a certain job isn’t a substantial burden, and the case relied on by the court was decided before *Goldman*, a case which shows why the reasoning in the 9th circuit case is dubious: the key thing isn’t that there wasn’t a burden; the key thing is that the military has a very strong interest in uniformity.<sup>33</sup> It’s not that there’s no right to enlist, it’s that the right to enlist can be outweighed by a strong government interest. The bankruptcy case is harder, we might think, because the state interest in having a preparer’s Social Security number on the form is lesser (and presumably also easier to accommodate).

But put that to one side. Maybe the court got the secular cost of giving up one’s job wrong—but maybe it got it right. Maybe not being able to be in a particular line of work is a lot less bad than not getting welfare benefits or not being able to drive. That is at least arguable. Still, is there anything particularly problematic about the court saying that a secular burden is not substantial, and on that basis finding that there was no substantial burden on the exercise of a person’s religion? I think there is, and it has to do with more than the fact that drawing the substantial/non-substantial secular burden line is hard (as I mentioned above). Of course it is hard, but many judgments that courts have to make are hard. It has to do, also, with the fact that even when the court says that the secular burden is not that great, this still goes into an overall judgment that the burden on one’s religion is not substantial.

I said, above, that courts should be reluctant to second-guess when a person is facing a substantial religious burden—that they shouldn’t say, for instance, that missing one sacred meal is not that bad, or that their religion doesn’t really forbid them from taking a driver’s license photo without wearing a veil. But maybe it is also the case that courts should be reluctant to second-guess when a person says he or she is facing some sort of substantial secular pressure to go against his or her religion.

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<sup>29</sup> Here I follow up on the promissory note made at the end of Part I.

<sup>30</sup> *In re Turner*, 193 B.R. 548 (Bankr. N.D. Cal. 1996)

<sup>31</sup> The fine that Snyder faced didn’t seem to factor into the analysis of the court.

<sup>32</sup> This seems to miss the point of having accommodations in the first place, viz., so that people don’t have to choose between doing their job and practicing their religion.

<sup>33</sup> “[T]he First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations.” *Goldman v. Weinberger*, 475 U.S. 503, 509-10 (1986).

That too is a judgment about that person's religion, or at least her relationship to it: what kinds of pressures might make her go against what her religion says, and how serious those pressures have to be before she bends or breaks. This may, in turn, be a function about how important a particular part of her religion is to the plaintiff.<sup>34</sup> Even if we can analytically separate religious and secular burdens—per Lupu and Tuttle—maybe our respect for religious freedom should extend to deferring to when a plaintiff says that there is substantial secular cost at play as well. At the least, such a position does not seem to me implausible.

#### IV.

The previous Part goes nearly all of the way toward making my argument that courts should stay away from saying whether or not there has been a substantial *religious* burden on the plaintiff. It's too hard, and it ends up with courts messing around (and messing up) in areas that they have no special competence in, and that there are good reasons for them to stay away from. Courts don't know when missing a religious meal is a substantial burden, and when it's a mere inconvenience. Nor do they know—nor should they be deciding—what interpretation of Islamic law is correct. Leave these judgments to the plaintiffs. If the burden is substantial enough *to them*, they'll sue. Indeed, there's even a case to be made that courts should not be in the business of determining when there's a substantial *secular* burden, if only that this is a way of really steering clear of *any* religious debates. Courts should stick to compelling interests and least restrictive means, and stay out of substantial burdens.

Or at least they should mostly stay out of substantial religious burdens. There is a threshold determination of burden that courts must make, and in this Part I describe what that is. Courts have to refuse to apply RFRA in cases where there is no burden at all on the plaintiff, and they cannot leave it to the religious plaintiff to say whether there is or is not a burden. If there's no burden, the person shouldn't be able to get any relief under RFRA. My argument to this conclusion is going to take two steps. First, I'm going to examine a case (*Lyng*) where there may be an impact on the religious believers practice, but there won't be a burden. In this case, the plaintiff fails at the threshold level – he fails to show that there is what we can call a *bare* burden. If there's no "bare burden," then the plaintiff may suffer a real cost to his religion but he isn't being burdened by the government. In the second step, I'll look closely at a case where there is this bare burden (*Bowen*). I'll close by considering the last example from the beginning of the paper, *Extra Paperwork*.

##### A. The "Bare Burden" Requirement

We've so far been talking about when something is or isn't a substantial burden – for the most part keeping the words "substantial" and "burden" together. But what makes something a burden in the first place, whether or not that burden is substantial? The classic "no burden" case is *Lyng*, but there have been other cases that have followed in *Lyng*'s wake and making pretty much similar points.<sup>35</sup> In *Lyng* the Court held the fact that the United States Forest Service was going to pave a road through a site traditionally used for religious purposes by Native Americans didn't amount to a "substantial burden." In an analogous circuit level court case, *Navajo Nation*, also against the Forest Service, the

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<sup>34</sup> A plaintiff may consider it a small thing to lose one's job in order to preserve some of her religious beliefs. Does this mean that the secular cost should be considered by the court to be insubstantial? It seems not.

<sup>35</sup> *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988)

Ninth Circuit ruled that the use of recycled wastewater to make snow on a mountain considered “sacred” by some Indian tribes was also not a burden.<sup>36</sup>

These cases were correctly decided, I think, and they can help us draw the line between when there is a burden and when there is not, but from another angle they are deeply counterintuitive. In *Lyng*, the Court says a little dismissively that the destruction of their sacred space (and their replacement with a paved road) would make the practice of the tribes’ religion more difficult. But the logic of the Court’s position seems to be that the road could even make the practice of their religion *impossible* and it wouldn’t affect the judgment of the court that there was “no burden”—and the Court says as much. So too, in *Navajo Nation*, the court admits that even if the mountain was not just polluted with recycled snow but simply *blown up*, there would not be a burden.

We should want to know why, in these cases, making something harder to do (or even making something impossible) does not count as a burden or as burdening the practice of their religion. After all, forcing the Amish to send their children to secular schools makes it harder for them to practice their religion—and that, the Court says, is part of the burden in *Yoder*. The Court even said that there was really a burden in *Yoder* because secular education threatened the destruction of the Amish religion. Why can’t we say then, that there is a burden in *Lyng* or *Navajo*? The government practices there, too, risked destroying the Indians’ ability to practice their religion, and so there is a perfectly ordinary sense in which both *Lyng* and *Navajo* involve burdens on belief.<sup>37</sup>

What distinguishes *Yoder* from the Indian cases is the idea that the Forest Service wasn’t really doing anything directly to the tribes, wasn’t making them do anything, wasn’t putting them to a choice between their faith and a penalty. As the court put it in *Lyng*, the actions of the government didn’t have the “tendency to coerce” anybody into “acting contrary to their beliefs.”<sup>38</sup> The Ninth Circuit in *Navajo* echoed *Lyng* precisely on this point: the government may have destroyed their site of worship, but they wasn’t coercion. The Ninth Circuit seemed to be saying: if the government destroys your sacred site, but doesn’t force you to do anything, it isn’t much different than if an avalanche did the damage. It’s a bad thing, but it’s not a burden.

In *Yoder*, the state of Wisconsin was coercing the Amish to send their kids to secular schools, on pain of government sanction (a fine or jail time). There wasn’t just a tendency to coerce—there *was* coercion: “Send your kids to a secular school or face a fine and possibly jail time.” In *Lyng* and *Navajo*, the government is just saying, “We are going to end up probably destroying or defiling some of your sacred sites. We are very sorry about this, but at the same time we are not making *you* do anything—except perhaps suffer the consequences.” Maybe the mere existence of secular schools makes it harder for the Amish to practice their religion; some parents might be tempted to send their kids to those schools. For that matter, maybe *a lot* of facts about the modern world make the Amish religion more difficult to practice. But it is only when the government says “send your kids to these schools or else x will happen” that we have a burden. And so maybe the destruction of the forest or the mountain makes it harder for the tribes to practice their religion. But until there is a *choice* that the tribes have to face, until some pressure is put on the tribes by the government, we don’t have a burden.<sup>39</sup>

Call this requirement I see under RFRA that there has to be some sort of pressure put on the plaintiff—as opposed to just something bad that happens that makes practicing his or her religion more difficult—the requirement that there be a “bare burden.” The plaintiff has to show *this*, and the Court

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<sup>36</sup> *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008).

<sup>37</sup> A point made with great persuasiveness by the dissent in *Navajo*.

<sup>38</sup> *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 450-51 (1988)

<sup>39</sup> Another way of putting this point is to say that in cases where there is no government pressure, the plaintiffs simply don’t have standing to challenge the government’s actions. There is no injury that the government is causing.



has to agree that there is a bare burden. And on this question, there should be no deferring to the plaintiff. That is, the plaintiff has to show that something the government is doing is putting pressure on her to change or modify her religious beliefs. She cannot say the government is burdening her just because the government has done something that makes the practice of her beliefs more difficult: it has to be doing something *to her*, where she is being put to a choice where that choice involves some secular costs. This is the “bare burden” requirement, and it is what makes my view only partially subjectivist. I am willing to defer to the plaintiff as to whether a burden on her religion is “substantial.” I am not willing to defer to the plaintiff as to whether there is a burden at all.<sup>40</sup>

### B. *Extra Paperwork*

*Lyng* isn’t the only case that helps us get a handle on the “no burden” requirement. Before there was *Lyng*, there was *Bowen*, which although a mess procedurally is illuminating as to the line between no burden and a substantial burden, and to my mind is the best case to help shed light on the most recent round of challenges to the ACA under RFRA.<sup>41</sup> *Bowen* dealt with not one, but two alleged burdens. The first was an objection by the father to the government assigning his daughter a Social Security number. The second was an objection to the requirement that the father use the Social Security number in order to receive benefits for his child. The former, I think, amounts to a “no burden,” because it is just about something the government is doing which—although the father may not like it—is not pressuring Bowen to do or change anything about his religious beliefs. The latter, however, is a burden and so is a substantial religious burden if Bowen says it is. The government is saying, “If you want benefits for your daughter, you must use this Social Security number.” There is pressure and a choice Bowen has to make. Bowen doesn’t want to have to make this choice, because either way, he loses. He either loses the benefits (which we can stipulate amounts to a serious secular cost) or he becomes complicit in doing something that is against his religion. For this second burden, we go to the compelling interest and least restrictive means analysis.

My sense is that *Bowen* is one of the better lenses through which to view the cases now proceeding through the courts regarding the contraceptive mandate. The cases are not *Hobby Lobby*, they are *Hobby Lobby 2*.<sup>42</sup> So let me say a little bit about my last example, *Extra Paperwork*. In it and cases like it, the government has provided an exemption to the contraceptive mandate to various religious non-profits, such as universities. The exemption is *not* that they do not have to provide contraceptive coverage to those students who attend the university, or who work for it. (This is what these religious non-profits probably really want.<sup>43</sup>) Rather, the exemption means that the government will arrange 1) that contraceptive coverage is provided and that 2) the non-profits themselves do not have to be involved in paying for it. This is precisely the “least restrictive means” that was put forth as a model in the *Hobby Lobby* case. But the non-profits in these cases don’t like the accommodation, and don’t think it goes far enough, because the non-profits object to having to fill out the form that grants them the objection. They think that *this*—the filling out the form—is a burden on their religious beliefs and a substantial one. They don’t want to fill out the form.

I find myself inclined to agree with them, but it really depends on how we understand the facts and the nature of the university’s objection. One way of considering that objection is that filling out the paperwork is itself a burden—that it is cumbersome to have to ask for an accommodation. This goes to

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<sup>40</sup> This leads to my favored reading of the text. A burden is substantial only insofar as the government is in some sense *causing* the burden. Otherwise, it may be a burden, but it is not a substantial one for the purposes of RFRA.

<sup>41</sup> *Bowen v. Roy*, 476 U.S. 693 (1986).

<sup>42</sup> *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014).

<sup>43</sup> They want, in other words, want to be treated like “houses of worship” are now treated under the law.

how large the secular cost is, and maybe some plaintiffs will say this—that the government is asking too much to get out of the religious burden that they face. Although I suggested that I had some sympathy for the idea that we defer to plaintiffs as to whether something is too great a secular cost, I think this is probably a loser, and no one has made *this* particular claim. If anything is going to be a *de minimis* secular cost, it is filling out a two-page form. I do not, though, say that having to go to great lengths to get an accommodation will never be a substantial burden, because sometimes it will be.<sup>44</sup>

A second way of considering the objection is that the university doesn't want to be a "trigger" for contraceptive coverage. But the problem putting the burden this way is that filing out the form doesn't itself trigger the coverage. In his decision in the *Notre Dame* case, Judge Posner is quite right in rejecting Notre Dame's argument that by filling out the form Notre Dame is somehow facilitating the provision of contraceptive coverage. They aren't. The government is going to provide that coverage either way, that is, whether Notre Dame fills out the form. The form just tells the government that Notre Dame wants to be accommodated: it tells the government, in other words, precisely that they are not going to do any of the facilitating. Compare this to an analogous *Bowen* case. Suppose *Bowen* was under the impression that by filling out a form that asks for benefits for his daughter, he would be authorizing the government to give his daughter a Social Security number. But it turns out this is false. The government is going to give his daughter a Social Security number no matter what he did, whether he fills out a form or not. So there is not really a burden, because of Bowen's false beliefs about what filling out the form does.

There is a larger point here, and a significant one. If courts are going to inquire into whether there is a bare burden, whether the plaintiffs' beliefs are true about how the government program works is going to be part of this analysis. If a person believes that his income taxes are going to pay for the building of monument to Satan and this is false, then the plaintiff can't say that there is a burden because the government is putting him to a choice between paying taxes and erecting a Satanic statute. There is no burden because there is no choice. If Posner is saying that Notre Dame is wrong because it has made a factual mistake about whether it is acting as a "trigger," then I agree with Posner: there is no burden at all, let alone a substantial one. Notre Dame is just objecting to a government program it doesn't like, one which happens to provide contraceptive coverage to its students. If this is the way that the plaintiffs in these cases are characterizing their burden, then they should lose. There is no burden, which is to say, there is not a "bare burden."<sup>45</sup>

This may not be all Notre Dame is complaining about; there may be yet a third way to conceptualize the "burden" here. Go back to *Bowen*. Suppose in *Bowen*, Bowen had to fill out a form saying that he objected to having to provide his daughter's Social Security number if the government was going to give his daughter benefits. On this variation, he has to fill out a form to say he objects to filling out a further form. He believes (let's say) that this burdens his religious practice because filling out that form somehow suggests that the Social Security system is legitimate, that it is OK to give everyone a number. He is saying that filling out the form is the burden, not the government giving his daughter a Social Security number (which we can presume the government will do in any case). If Bowen doesn't fill out the exemption form, he loses any chance at getting his daughter benefits. I say this is still a burden, because it is putting Bowen to a choice: fill out this form or forget about your daughter getting the benefits. So too Notre Dame might object to filling out a form saying that it objects to the

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<sup>44</sup> United States v. Friday, 525 F.3d 938 (10th Cir. 2008).

<sup>45</sup> It is possible that in *Hobby Lobby* there actually was no burden. The plaintiffs in that case thought that some of the drugs mandated by the Affordable Care Act caused abortions. But suppose that they actually did not. Does it follow that the plaintiffs were not burdened at all by the mandate? If the science was uncontested, and no reasonable person could believe that the drugs were abortion-causing, then I think it would follow that there would be no burden.

accommodation—because it suggests to Notre Dame that the system of providing contraception to its employees that the ACA has set up is OK.

We may think that this burden is too attenuated to come close to being “substantial”—how is Notre Dame *in any way* responsible, if it is just objecting to a form that really does nothing to advance the goals of the ACA? But that decision is not up to us and not for courts to police. It is not up to courts to say that filling out the form washes the institution’s hands clean from sin or whether it is just another, different way of dirtying them. If Notre Dame sees the burden the latter way, then my partially subjectivist view says they should win at this stage: they have shown a burden and if they say that burden is “substantial,” then we shouldn’t say that it isn’t. Our only question is whether government putting pressure on them to do *something* that they see as a substantial burden on their religion.

## Conclusion

If we adopt the partially subjectivist view this tells us very little in the abstract about whether more or fewer religious plaintiffs will win in the end. It may be that allowing more plaintiffs to claim that they face a religious burden, courts will be more searching as to whether those beliefs are really sincere, viz., whether plaintiffs really believe that missing this meal or signing this form is a burden on their religious beliefs. I don’t think this is a good idea—it is against the tenor of the arguments in Part III—but it may happen. It could also be that if we adopt the subjective view as the right view of RFRA, courts will respond by a) finding substantial burdens more often but b) *also* finding strong compelling interests more often. The upshot would be that cases that use to lose at the substantial burden stage will still lose, but this time at the compelling interest stage. In many of the prisoner cases, for example, I think this is what *should* happen: the interest the prison has in enforcing a lock-down will usually justify a prisoner missing a few religious meals. The loss of those meals is still unfortunate, there is still a cost, but it can be all things considered justified. And to my mind, it is better that it be justified in this way (if it is to be justified) because it at least acknowledges the trade-off. Holding that there is no burden in these cases is too easy; it lets us ignore the conflicts there are really there.<sup>46</sup>

But seeing the partially subjectivist view as the right view in interpreting RFRA may lead us to a broader normative conclusion. Maybe there is something bad about a proliferation of rights claims, even when those claims in the end lose. Seeing all these substantial burden claims as legitimately asserted may make us think twice about seeing all of them as legitimate claims. Subjectivism, after all, is usually not a word of praise, and that the partially subjective view is the best way of interpreting RFRA may lead us to say “all the worse for RFRA.”

Maybe instead of giving subjective opinions of substantial burdens their due, we should just shut the whole thing down. This is not an indefensible position, and it is not inconsistent with agreeing with everything I’ve said in this paper. My conclusion is only: if we are to have something like RFRA, and we want to say that RFRA only applies when there are “substantial burdens” on religion, the best way of interpreting that phrase is mostly subjective. If we are going to accommodate people’s religious beliefs, then it should be mostly up to them—and not to us—what sorts of burdens on religious belief are substantial enough to merit an accommodation.

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<sup>46</sup> I take this to be one of the key insights of Isaiah Berlin’s pluralism: we should be aware when values are really in conflict, and when there is a choice to be made, and loss happens no matter what we choose. There is something worthwhile about seeing the conflict for what it is, rather than trying to deny that it is really there (e.g., that there is no burden, so no need to see whether the governmental interest outweighs).